

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7461

Petition of ValleyNet, Inc., for a Certificate of Public)
Good to own and operate a cable television system in the)
State of Vermont, to provide services in the City of)
Montpelier, and the Towns of Barnard, Bethel,)
Brookfield, Chelsea, Granville, Hancock, Hartford,)
Norwich, Pomfret, Randolph, Reading, Rochester,)
Royalton, Sharon, Stockbridge, Strafford, Thetford,)
Tunbridge, Vershire, West Windsor, Williamstown, and)
Woodstock, Vermont)

Order entered: 1/22/2010

I. INTRODUCTION

ValleyNet, Inc. ("ValleyNet" or the "Company"), requests issuance of a certificate of public good ("CPG" or "Certificate"), pursuant to 30 V.S.A. §§ 503 and 504, to operate a cable television system to serve the Towns of Barnard, Bethel, Brookfield, Chelsea, Granville, Hancock, Hartford, Norwich, Pomfret, Randolph, Reading, Rochester, Royalton, Sharon, Stockbridge, Strafford, Thetford, Tunbridge, Vershire, Williamstown¹, West Windsor, Woodstock, and the City of Montpelier. In this Proposal for Decision, I recommend that the Vermont Public Service Board (the "Board") conclude that ValleyNet should be issued a CPG as requested to begin operating as a cable television provider within its designated service territory within the state.

II. PROCEDURAL HISTORY

On July 14, 2008, ValleyNet, pursuant to 30 V.S.A. §§ 503 and 504 and the rules and regulations of the Board, filed a petition and an Application for a Certificate of Public Good for

1. On October 20, 2008, Williamstown's selectboard voted not to sign the interlocal agreement that would have bound the town to join the ECFiber consortium. As a result, this Order and the CPG will not apply to Williamstown without a separate future petition to and action by the Board.

the Operation of a CATV System ("CATV Application"), seeking to provide CATV services within and throughout the communities listed above.

On September 8, 2008, I held a prehearing conference attended by representatives of ValleyNet, East Central Vermont Community Fiber, New England Cable Telecommunications Association, Inc. ("NECTA"), and the Vermont Department of Public Service (the "DPS"). On September 11, 2008, the NECTA filed a motion to intervene in this docket. ValleyNet and the DPS opposed NECTA's motion to intervene. I took NECTA's motion under advisement while the proceedings continued, but allowed NECTA to continue to participate informally.

ValleyNet subsequently filed, by letter dated March 17, 2009, a revised proposed CPG and joint Memorandum of Understanding dated March 17, 2009 ("MOU"), that was executed by ValleyNet and the DPS requesting, among other things, that the Board grant to ValleyNet a CPG as proposed. Of note, the proposed CPG removed the Town of Williamstown from the proposed service territory. NECTA objected to the proposed CPG and ValleyNet and the DPS renewed their oppositions to NECTA's motion to intervene. Finally, on July 28, 2009, ValleyNet, with the support of the DPS, filed a proposed form for a final order; NECTA filed a lengthy response to the proposed order, and ValleyNet filed an objection to that response.

NECTA has consistently argued that two of the companies that it represents, Charter Communications and Comcast, have an interest in assuring that ValleyNet does not receive a CPG on more favorable terms than those under which they themselves operate. ValleyNet has replied that NECTA's actual interest is in delaying issuance of a CPG for as long as possible, indefinitely if possible. While NECTA has often played a constructive role in previous Board cases, it was not clear to me that it had any particularly helpful perspective on this case. I postponed ruling on the motion to intervene, and allowed the parties and NECTA to discuss a final resolution. In fact, it appears that the final product arrived at in the proposed CPG is substantially improved from the original form, at least partly due to NECTA's influence. However, NECTA's contribution has not been entirely benign. On August 7, 2009, NECTA filed its response to ValleyNet's proposed final order. In that response NECTA argued, as it has throughout this proceeding, that the Board ought to apply the same competitive neutrality standards as were imposed upon Burlington Telecom in Docket 7044 (*Petition of City of*

Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont, Order issued 9/13/05). In support of this argument NECTA stated that:

Specifically, 24 V.S.A. § 1913(e) states: "any certificate issued to a municipality for a cable television franchise shall contain terms or conditions that are consistent with this section, and, with a goal of establishing competitive neutrality, shall establish terms and conditions consistent with those imposed on existing certified cable television systems, after evaluating factors including, but not limited to, payment of pole attachment and rental fees, and the provision of public access channels, equipment and facilities."

In fact, as ValleyNet notes in its response filed on August 24, 2009, 24 V.S.A. § 1913 says no such thing. NECTA went on to quote at length, with 'emphasis added,' from 24 V.S.A. § 1913(g); it was very strong language but, unfortunately, 24 V.S.A. § 1913 does not have a subsection (g), nor does the quoted language appear elsewhere in 24 V.S.A. Chapter 54. Both of these 'quotations' may be paraphrases of provisions of the City of Burlington charter, or they may be from draft legislation never adopted, but they are not law that the Board must apply to ValleyNet. I can accept that NECTA's citation to non-existent statutory language was inadvertent, not an intentional attempt to mislead; however, the larger point is that NECTA would like to burden ValleyNet with CPG requirements that are not required and that would interfere with ValleyNet's ability to build its system.

As NECTA has not demonstrated a substantial² interest in this proceeding, I conclude that NECTA's motion to intervene should be denied.

I have reviewed ValleyNet's petition for a cable TV CPG and the accompanying documents (including the Prefiled Testimony of Dr. Timothy E. Nulty on behalf of ValleyNet ("Nulty pf.") and the Supplemental Prefiled Testimony of Dr. Nulty ("Supplemental Nulty pf.") as well as the MOU and proposed CPG negotiated with the Department and the proposed final order, and conclude that a CPG should be issued without hearing.

Pursuant to 30 V.S.A. § 8, and based on the record before me, I present the following findings of fact and conclusions of law to the Board.

2. The Board has long ago ruled that protection of a de facto (but not de jure) monopoly is not a legally protected interest. Docket 5279, *Petitions of Small Cities Cable of Newport, Inc.*, Order issued 12/20/90.

III. FINDINGS

A. ValleyNet

1. ValleyNet has all of the necessary authority to transact business in Vermont. ValleyNet is incorporated in Vermont and was granted a Certificate of Incorporation on October 26, 1994, by the Vermont Secretary of State. CATV Application at Exhibit C.

2. ValleyNet proposes to provide CATV services throughout the Towns of Barnard, Bethel, Brookfield, Chelsea, Granville, Hancock, Hartford, Norwich, Pomfret, Randolph, Reading, Rochester, Royalton, Sharon, Stockbridge, Strafford, Thetford, Tunbridge, Vershire, West Windsor, Woodstock, and the City of Montpelier (the "Proposed Service Territory"). CATV Application at 1; MOU at 1.

3. ValleyNet maintains its offices at 58 North Main Street, White River Junction, Vermont. CATV Application at 1.

B. The ValleyNet Project

4. During the past few years, a number of citizen groups throughout the East Central region of Vermont sought to improve the quality of the telecommunications infrastructure and services within their region. During the summer of 2007, these groups coalesced into an informal regional group and in October, 2007, this group adopted the goal of creating a regional, municipally-owned "Fiber-to-the-Home" ("FTTH") network (the "Project"). On Town Meeting Day, March 4, 2008, the twenty-two towns comprising the Proposed Service Territory voted overwhelmingly to recommend that their respective Select boards sign an Interlocal Contract ("ILC") creating a formal joint body to undertake the proposed project. These twenty-two towns have signed the ILC. The ILC has adopted the formal name of "East Central Vermont Community Fiber Net" or "ECFiber." Nulty pf. at 3-4.

5. The current population of these twenty-two towns (which comprise the proposed service territory as identified above) is approximately 51,000 people and 24,000 households. Supp. Nulty pf. at exhibit VN-TEN-12.

6. It is impractical for ECFiber, itself, to build and operate the network at this time. Accordingly, ECFiber has hired ValleyNet, which has the necessary telecom experience and

expertise as well as a compatible corporate purpose, to execute the Project. ValleyNet and ECFiber intend to enter into a Design/Build/Operate Agreement (the "DBO Agreement") covering all aspects of ValleyNet's role as builder and operator of the network. Nulty pf. at 5-6; MOU at 2.

7. The Project will be a fully digital Internet Protocol ("IP") platform in which data, voice and video signals will be fully integrated into a single bit stream to the customer's premise. There, equipment will separate the streams into their constituent parts and route them to the appropriate terminal equipment. This network will utilize the latest International Telecommunications Union ("ITU") standard Passive Optical Network ("G-PON") transport platform. Several manufacturers produce this equipment but ValleyNet has chosen the system produced by Alcatel-Lucent as the most appropriate and cost effective. The optical fiber cable infrastructure will be organized as a "modified home-run"; each premise will be served by its own fiber(s), which fibers will terminate in a small number of secure sites. Nulty pf. at 14-15.

8. ValleyNet intends to locate the Hub, including an Internet Protocol Television ("IPTV") head-end, in White River Junction in order to be close to the major Fairpoint Vermont, Inc., tandem switch, also located in White River Junction. Nulty pf. at 15.

9. Cable television will be entirely IPTV in a closed system. ValleyNet is currently considering two options: (a) construct and operate a full head-end; or (b) utilize a head-end provided by one of the content aggregators, such as the National Rural Telecommunications Co-operative ("NRTC"), which packages the head-end with cable content. ValleyNet intends to choose between the two options based on financial grounds. Nulty pf. at 15.

C. Statutory and EMCO Criteria³

(1) Statutory Criteria — 30 V.S.A. § 504(b)

Designation of adequate channel capacity and appropriate facilities for public, educational, or governmental use

10. ValleyNet's network will have the capacity to transmit 100,000 cable channels. With this capacity, ValleyNet will be able to provide Public, Educational, and Governmental Access

3. The "EMCO" criteria are set out in PSB Rule 8.214 (B).

Management Organizations ("AMO"s) with as many channels as they can fill with content. Nulty pf. at 36.

11. ValleyNet has committed to providing the AMO's with the channels free of charge. Nulty pf. at 36.

12. ValleyNet intends to design and build its system to meet federal Rural Utilities Service ("RUS") specifications, which are sufficient to assure the system is adequate and technically sound. Nulty pf. at 15, 16, 35; CATV Application at 9.

13. ValleyNet's network will be one of the most advanced and capable in the nation. It will also be robust and reliable, not simply because this is characteristic of the technology chosen but because all equipment used has already been proven in other public networks around the nation and the world. Nulty pf. at 37.

A reasonably broad range of public, educational and governmental programming

14. The all-fiber, all-digital design of ValleyNet's system will provide ample capacity to offer public access programming that is consistent with the community's needs. Nulty pf. at 36, 38.

The prohibition of discrimination among customers of basic service

15. All customers will be charged the same prices for any given cable service. Nulty pf. at 38.

Basic service in a competitive market and if a competitive market does not exist, that the system provides basic service at reasonable rates determined in accordance with section 218 of Title 30

16. ValleyNet will face competition in the provision of basic cable service from both cable TV and satellite TV service providers. Nulty pf. at 38.

Discussion

ValleyNet meets the five statutory criteria of § 504(b). ValleyNet is committed to reaching an agreement to provide specific operational and capital funding support for the AMOs.

In addition, ValleyNet's all-digital system will be more than adequate to meet the community's public access needs into the future. Finally, ValleyNet will overbuild the incumbent's existing cable and satellite systems bringing direct competition in the CATV market to its service territory.

(2) Statutory Criteria — § 504(c)

A reasonable quality of service for basic, premium or otherwise, having regard to available technology, subscriber interest and cost

17. The advanced architecture and capabilities of ValleyNet's system should assure that ValleyNet's services are of high technical quality. Nulty pf. at 39.

Construction, including installation, which conforms to all applicable state and federal laws and regulations and the National Electric Safety Code

18. All construction and installations will conform to the National Electric Safety Code ("NESC") and all applicable state and federal laws and regulations. Nulty pf. at 40.

A competent staff sufficient to provide adequate and prompt service and to respond quickly and comprehensively to customer and department complaints and problems

19. ValleyNet has hired and will hire a number of individuals, including several who have substantial relevant experience in customer care. Consistent with ValleyNet's intentions, employment of competent staff is reflected in the pro forma financial statements provided by ValleyNet. Nulty pf. at 40-41.

20. ValleyNet agrees to comply with the Customer Service Quality and Complaint Standards, Monitoring and Reporting Plan. CPG App. Exh. K; Nulty pf. at 33.

Unless waived by the board, an office which shall be open during usual business hours, have a listed toll-free telephone so that complaints and requests for repairs or adjustments may be received

21. ValleyNet will provide trained service representatives and management personnel to handle questions and correct problems or complaints during normal business hours, and will have

a qualified service technician on call to respond during non-business hours. Nulty pf. at 41-42; CPG App. at 4.

Reasonable rules and policies for line extensions, disconnections, customer deposits and billing practices

22. ValleyNet has expressed its commitment to extend its service to every residence, business, and institution in the Proposed Service Territory within five years after the CPG is granted. Nulty pf. at 27.

23. Through its Proposed CPG, ValleyNet has expressed its intent to establish and adhere to rules and policies for disconnections, customer deposits, and billing that conform to the Board's administrative rules. Proposed CPG at 9-10.

Discussion

ValleyNet meets the five statutory criteria of § 504(c). The advanced architecture of ValleyNet's system will allow it to assure high technical quality of its services. Further, its programming through NRTC and agreements with local broadcasters will assure ample programming content. ValleyNet will construct its system in accordance with National Electric Safety Code standards and other applicable state and federal laws and regulations. The ValleyNet staff will be sufficient to provide adequate and prompt customer service. In addition, the conditions in the proposed CPG will impose specific customer service and performance measures on ValleyNet, including requiring ValleyNet to conform to federal customer service standards, to monitor its performance relative to federal and Board-established customer service standards, and to submit monitoring and corrective action reports quarterly to the Department and Board. Further, ValleyNet intends to have trained representatives available during business hours and a service technician on-call outside of normal business hours. Finally, ValleyNet has expressed its commitment to extend its service to be available to every residence, business and institution in its service territory within five years and to adhere to rules and policies for disconnections, customer deposits and billing that conform to the Board's administrative rules.

(3) The "EMCO" Criteria of Rule 8.214(B)

Financial soundness and stability, both of the applicant generally and the particular proposal

24. ValleyNet is a financially sound 501(c)(3) non-profit organization registered in Vermont. Cash exceeding \$320,000 and an additional line of credit is available to ValleyNet to finance its role in the initial organization of the Project. This amount is sufficient to sustain the Project until project financing can be obtained through the municipal capital lease facility. Nulty pf. at 22.

25. The Project itself will be financed by ECFiber via a capital lease program whereby each of the ECFiber participating towns will enter into a capital lease with a designated lessor. Nulty pf. at 21.

26. The exact sum required to fund the Project will depend upon which towns ultimately choose to participate. However, it is expected to be between \$50 and \$90 million. Based on estimates of the current financial markets by the Investment Bank chosen to manage the placement of the Lease securities, the interest rate is expected to be in the 6.5–7.0 % range with a 3.25 year "interest-only" payment period at the beginning followed by 20 years of full lease payments. Nulty pf. at 22.

27. ECFiber will engage ValleyNet to design, build and operate the network by means of a Design/Build/Operate contract ("DBO Contract")(see Exhibit VN-TEN 3). Legal ownership of the fiber network will remain with the holder of the Lease and will revert to ECFiber when the Lease is paid off. Nulty pf. at 21.

28. Based upon the pro-forma financial statements and the description and discussion of the key assumptions that underlie the plan, it is reasonable to expect this project to be economically viable for ValleyNet. Nulty pf. at 22.

29. ValleyNet has designed this project to be financially self-sufficient, in that it will not require the input of general or tax-based funds from any of the ECFiber towns. Nulty pf. at 6-9.

Discussion

ValleyNet meets this criterion. ValleyNet already holds a CPG for telecommunications services, demonstrating the stability of the applicant, and the proposed lease arrangement will

provide sufficient funds to build and operate the CATV system until such time as ValleyNet's projections indicate revenue will be sufficient to make the rental payments on the lease. Even recognizing that such projections are inherently subject to uncertainty and change over time, ValleyNet's business plan provides a financial cushion adequate to allow ValleyNet to weather variances in actual results from those presently projected.

Moreover, the state and federal policy of encouraging competition and the intended public benefits of such competition outweigh any reservations the Board may have regarding ValleyNet's revenue projections. The Board has not established as a standard for review of any cable franchise that the operator must demonstrate unequivocally that its enterprise will succeed financially, particularly where consumers have an alternate choice of service provider. See Docket 5279, Order of 12/20/90 at 12 ("if competition is to even partly replace regulation, it should be of little concern and no surprise to the Board that not all competitors will survive the experience"). Moreover, the fact that the lessor, which presumably has purely financial objectives, will put a substantial sum of capital at risk for this project would be a strong indicator of the soundness of the project and ValleyNet's business plan.

The present proposed service offerings to customers, including the number of channels and the ability and capacity of the system to offer additional varied services in the future, and the ability to provide public access

30. ValleyNet intends to offer programming similar to that of Burlington Telecom and will have the policy of offering the maximum flexibility of customer choice possible within the constraints imposed by the content providers. Nulty pf. at 24.

31. Unlike most cable providers, ValleyNet will permit all subscribers to obtain "premium" channels regardless of which tier they choose. ValleyNet will also include on-demand video content, some of which ValleyNet will charge a pay-per-view fee for. Nulty pf. at 24.

32. ValleyNet will have the capacity to offer 100,000 channels. ValleyNet will use this capacity to make maximum channel capacity available at extremely low prices to local content providers and free to all content providers who have a public interest dimension. Nulty pf. at 24.

33. The system will have DVR capability built into it. A cable subscriber can also use his or her own DVR in conjunction with ValleyNet's cable service. Nulty pf. at 25.

34. ValleyNet will be offering high-definition programming. ValleyNet will also offer an on-screen program guide. Nulty pf. at 25.

Discussion

ValleyNet meets this criterion. The ValleyNet system will be configured to handle hundreds of channels, and will be able to accommodate more, if needed. Further, ValleyNet proposes rates that will be competitive (see finding 42, below).

The IP-based system ValleyNet intends to build will permit ValleyNet to offer programming that meets or exceeds the community's needs for public access for the foreseeable future and will provide more than adequate upgrade and expansion capabilities.

The commitment to a construction and in-service schedule

35. ValleyNet has committed to construct a system within 60 months from the time of financial closing that will pass every residence, business, and institution within the service territory, although it intends to complete the construction earlier. Nulty pf. at 27.

Discussion

ValleyNet meets this criterion. The construction schedule proposed by ValleyNet is reasonable.

The experience and ability of the applicant to run and manage a cable TV system

36. ValleyNet has a strong record of accomplishment in creating and operating for an extended period the first public Internet access service in the Upper Valley of Vermont and New Hampshire. When ValleyNet sold its dial-up Internet access business to Sovernet in 2005, it had over 6,000 accounts. The board members of ValleyNet have a diverse and extensive range of expertise that is well suited to start-up and operation of a communications network that operates in the public interest. ValleyNet board members include a former General Counsel of the Federal Communications Commission, and a former Chief Financial Officer of two mobile cellular telecommunications companies, both of which were publicly traded on NASDAQ. As such,

ValleyNet already has experience in many of the key areas: legal, IT, network management, customer management, marketing, accounting, and finance. Nulty pf. at 27-28.

37. In addition, ValleyNet hired Tim Nulty to plan and organize the Project, and to manage its design, construction and operation. Mr. Nulty, among other things, served as the initial Project Director for Burlington Telecom, for 5½ years where he took it from an idea to the point where the network was 90% built-out and operating successfully. Nulty pf. at 28.

38. ValleyNet has also retained Leslie Nulty as a project consultant to ValleyNet. Ms. Nulty has substantial expertise and experience as a manager and financial analyst including 4 years as Chief Executive Officer of a large retail food company and 4 years as controller of a venture capital telecommunications operating company. Nulty pf. at 28.

39. ValleyNet has also identified a team of experienced senior managers (including Chief of Technical Operations, Chief Engineer, Chief Information Officer and Director of Marketing and Customer Service) and 6 other mid-level managers and experts, all of whom are ready to join ValleyNet for this project as soon as the financing is in place. ValleyNet has also identified alternative personnel in the event any of these individuals become unavailable. Nulty pf. at 29.

40. As the network matures, recruiting will proceed in a normal fashion. Generally, emphasis will be placed on hiring local staff whenever possible. The Upper Connecticut and White River Valleys contain a large number of qualified people who will welcome an opportunity to work on an innovative, path-breaking community endeavor such as the Project. Nulty pf. at 30.

41. In addition, ValleyNet intends to partner with local institutions — including the Vermont Technical College in Randolph and the International Brotherhood of Electrical Workers in South Berlin — to develop a regular program to train skilled workers and professionals. Nulty pf. at 30.

Discussion

ValleyNet meets this criterion. Existing ValleyNet staff possess sufficient expertise for the early stages of the start-up, and ValleyNet's budget and plan to hire additional personnel with additional expertise necessary for the long-term operation of the CATV system is reasonable.

The rates proposed to be charged to customers

42. ValleyNet's business plan is based on an assumption that ValleyNet will offer competitive services at rates approximately 10-15% higher than those of Burlington Telecom. The slightly higher rates are due to the greater cost of serving large sparsely populated rural areas. Since there appears to be no current controversy as to whether Burlington Telecom's rates are reasonable (as required by its CPG), and ValleyNet intends to offer similar services at comparable prices, the Board can conclude that ValleyNet's prices will also be reasonable. Nulty pf. at 31–32.

Discussion

ValleyNet meets this criterion. The initial rates proposed by ValleyNet are reasonable.

Consumer policies, particularly re: complaints and problems

43. ValleyNet has proposed a Service Quality Plan that is similar to that of Burlington Telecom. Nulty pf at 33; CPG Application Exhibit K.

44. Among other measures, ValleyNet plans to provide a 24/7 call center with trained service representatives and management personnel available during normal business hours and technical support on call during non-business hours. Nulty pf. at 16.

45. ValleyNet has also proposed numerous CPG conditions relative to customer care. Proposed ValleyNet CPG at 10-14.

Discussion

ValleyNet meets this criterion. In addition, the CPG should include conditions as proposed by ValleyNet relating to customer care and the Service Quality Plan.

Availability of service to maximum number of residences

46. ValleyNet intends to build a system that will pass every residence, business, and institution in its service territory. ValleyNet has committed to complete the build-out within five years after it receives its financing for the project. Nulty pf. at 27, 33.

Discussion

ValleyNet meets this criterion. ValleyNet intends to pass every residence, business, and institution within its service territory within five years.

The quality of the engineering and materials used in the system

47. The project will be very closely patterned on the Burlington Telecom network, although updated to reflect advances in technology and the fact that ValleyNet intends to use a content aggregator who will transmit content from its own head-end. Nulty pf. at 14, 35.

48. ValleyNet's network will be a fully digital Internet Protocol ("IP") platform in which data, voice and video signals will be fully integrated into a single bit stream to the customer's premise. This network will utilize the latest International Telecommunications Union ("ITU") standard Passive Optical Network ("G-PON") transport platform. While several manufacturers produce this equipment, ValleyNet has chosen the equipment manufactured by Alcatel-Lucent as being the best and most appropriate for its application. Similar Alcatel-Lucent equipment has been chosen by a number of other municipal FTTH networks around the United States. Transmission will utilize carrier-grade GIG-E (one gigabit per second ethernet) technology in order to ensure a high quality of service. Nulty pf. at 14-15.

Discussion

ValleyNet meets this criterion. The system ValleyNet intends to build will be the most advanced of any in the state and will be designed and built in accordance with applicable federal standards.

Logical fit with neighboring systems

49. All of the territories covered by the Project, with the exception of Montpelier, are contiguous. Many of these areas have no CATV or broadband service at present. Moreover, the Project will cover the project area entirely, providing universal service. There will be no "holes"

in the ValleyNet system where households cannot get service and which might be difficult for any other operator to serve. Nulty pf. at 35.

Discussion

ValleyNet meets this criterion because ValleyNet will build its system to the maximum extent authorized by the legislature.

IV. CONCLUSION

The evidence in the record amply demonstrates that ValleyNet meets the EMCO and statutory criteria for issuance of a CPG. Further, the addition of a competitor in the ValleyNet market is an added benefit to consumers and consistent with both federal and state law and policy. Therefore, I conclude that issuance of a CPG to ValleyNet to provide CATV services throughout the ValleyNet territory will promote the general good of the state, and I recommend that the Board issue a CPG of the form agreed to by the parties.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 16th day of December, 2009.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

V. BOARD DISCUSSION

On the whole, we accept the Hearing Officer's proposed decision. However, we will make several modifications based upon the comments by the parties in response to the proposal.

First, ValleyNet filed comments that suggested a minor modification of a reporting date, several cross-reference corrections to the proposed CPG, and correction of certain typographical errors. We accept all of these proposed changes, and have made them as well as other nonsubstantive typographical corrections that the Board has discovered.

Second, NECTA filed comments that presented several arguments. NECTA recounts that it participated in discussions between ValleyNet and the Department even though it had not been granted party status by the Hearing Officer, and that the CPG jointly proposed by ValleyNet and the Department included the competitive-neutrality provisions that NECTA had argued for. As a result NECTA supports that portion of the Hearing Officer's proposal. Still, NECTA argues that the Hearing Officer erred in denying its motion to intervene, citing its useful contributions to the crafting of the final CPG provisions as well as the ongoing interest of its member cable operators in competitive effects from the new system. We conclude that, on balance, the Hearing Officer should have allowed NECTA to intervene, and we reverse that ruling. Therefore NECTA is granted permissive intervention.

NECTA also argues that, under Vermont law, the CPG cannot be held solely by ValleyNet. NECTA points to the relevant statute, 30 V.S.A. § 503(a):

No company may own or operate a cable television system unless it holds a certificate of public good issued by the board authorizing it to do so.

We find NECTA's argument to be persuasive. The statute is clear on its face: the owner of the system must have a CPG. As the project is proposed, ValleyNet will design, build, and operate the subject system, but clearly will not own it. ValleyNet attempts to rely on 24 V.S.A. § 1912, which authorizes municipalities to own communications plant, but it does not authorize municipalities to provide service to the public without a CPG. Furthermore, that section also provides that "[a]ll of the foregoing powers are in addition to and not in substitution for or in limitation of any other powers conferred by law." The Section 501 definition of what qualifies as a "company" includes a "person," and "person" as used in Vermont statutes includes

municipalities.⁴ Therefore, the city and the towns are covered by Chapter 13 of Title 30 and must obtain a CPG if they are to be the owners.

Given the plain language of 30 V.S.A. § 503(a) and the lack of any exemption for municipalities, we conclude that the owner or owners of the proposed system must obtain a CPG. We do not disagree with the argument put forth by the Department that issuing a certificate to all the prospective towns and city is likely to create an administrative burden on the Department and the Board. Still, the law requires that whatever entity or entities will own the system apply for and receive a CPG. We assume (but do not require) that the applicant will be ECFiber, and the filing may rely upon ValleyNet's CPG as representing the operational qualifications for the system, but the rest of the CPG criteria must be addressed.

Finally, we note that the system to be operated by ValleyNet will compete directly with other cable television providers in portions of its service territory, a situation similar to that facing Burlington Telecom. The recommended decision references Burlington Telecom several times; considering the more recent developments in the matter of Burlington Telecom, the Board will be particularly interested in how the towns will respond if the proposed project does not go as planned, and therefore this issue should be addressed by whatever entity or entities file for a CPG to own the system.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and conclusions of the Hearing Officer, as modified by the Board Discussion, are hereby adopted.

2. A certificate of public good shall be issued to ValleyNet, Inc., to operate a cable television system in the Towns of Barnard, Bethel, Brookfield, Chelsea, Granville, Hancock, Hartford, Norwich, Pomfret, Randolph, Reading, Rochester, Royalton, Sharon, Stockbridge, Strafford, Thetford, Tunbridge, Vershire, West Windsor, Woodstock, and the City of Montpelier, Vermont.

4. 1 V.S.A. § 128.

Dated at Montpelier, Vermont, this 22nd day of January, 2010.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: January 22, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.